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No. 97-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

CHARLES E. McDOWELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. Inasmuch as the Eighth Amendment does not require that a capital jury be instructed at all "on its obligation . . . to consider mitigating evidence" and "on particular mitigating factors deemed relevant by the State," *Buchanan v. Angelone*, No. 96-8400, 1998 WL 17109, at *4-5 (Jan. 21, 1998), does a state trial court commit constitutional error when it responds to a jury inquiry on consideration of potentially mitigating factors by referring the jury to responsive and legally flawless, but previously given instructions that clearly called for consideration of all mitigating evidence proffered by the defense?

2. Was the Ninth Circuit's result, in "the first case in Anglo-American jurisprudence to hold that a judge erred because he gave a jury instruction that is 100 percent correct" dictated, within the meaning of the new rule prohibition of *Teague v. Lane*, 489 U.S. 288 (1989), by the precedent of *Eddings v. Oklahoma*, 455 U.S. 104 (1982), which invalidated a trial judge's refusal to consider relevant mitigating evidence in capital sentencing?

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OCTOBER TERM, 1997

No. 97- _____

ARTHUR CALDERON, Warden, *Petitioner*,

v.

CHRLES E. McDOWELL, *Respondent*.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS OR JUDGMENTS BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit was reported at 130 F.3d 833 (9th Cir. 1997). The initial opinion of the Ninth Circuit, unanimously upholding the judgment and sentence herein, is reported at 107 F.3d 1351 (9th Cir. 1997). The panel opinion on rehearing, a two-to-one decision upholding the judgment and sentence, is reported at 116 F.3d 364 (9th Cir. 1997). The three slip opinions are reprinted in the Appendix submitted herewith.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit, rendered en banc and after the grant of rehearing, was entered on November 24, 1997. This Petition for Writ of Certiorari followed within 90 days. 28 U.S.C. §

2101(c); Sup. Ct. R. 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATUTORY PROVISION

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On the afternoon of May 20, 1982, Charles McDowell, while armed with a knife with a 10-inch blade, broke into a residence where he attempted to rape the housekeeper and then stabbed her to death. As McDowell left, he slashed the throat of, but did not kill, an elderly neighbor who had come to the front door to investigate screams he heard coming from the house. In August of 1984, a jury convicted McDowell of one count each of murder, attempted murder, and burglary, and

found true various additional allegations, including the special circumstances of felony-murder/burglary and felony-murder/rape and a prior Florida conviction for lewd, lascivious, and indecent assault on a child.

At the penalty phase of McDowell's trial, the prosecution presented aggravating evidence of two prior crimes: (1) oral copulation and sodomy committed against a four-year old boy; and (2) a brutal assault, including rape, sodomy, and oral copulation, committed against a woman in Florida before McDowell fled to California, where he murdered the housekeeper.

In mitigation, McDowell presented the testimony of family members, a former neighbor, a nurse, and a probation officer in an attempt to show that he had a tragic childhood, was abused by a religious fanatic father, had sincerely wanted help while in a mentally disordered sex offender program, and had benefitted therefrom.

During penalty deliberations, the jury inquired of the court whether it could consider eight listed instances of McDowell's background as mitigation.[1/] Out of the jury's

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1. In its third partial day of penalty deliberations, the jury sent the following written request to the trial judge:

> Direction: We have an 11 to 1 vote for death. The one juror empathically [sic] feels her mitigating circumstances are equal to the aggravating circumstances. The other eleven jurors do not all agree with the one juror[']s mitigating circumstances as all being either testimony or evidence that should be considered. Please advise which following circumstances can be considered mitigating circumstances.
>
> 1. Inadequate or insufficient psychiatric help.

presence, the trial judge voiced concern that the jurors were asking him to interpret the evidence and expressed a desire not to say anything that would be coercive. The trial court then referred the jury to, and instructed the jurors to read, two already given instructions, including the charge that:

> you *shall consider all of the evidence* which has been received during any part of the trial of this case. . . . [and] [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and *any other aspect of the defendant's character or personal history that the defendant offers* as a basis for a sentence less than death.

(Emphasis added.) The trial judge also read to the jury the previously given instruction on weighing and balancing mitigating and aggravating circumstances. The jury foreman affirmed that this had answered the jury's question "for now." The jury resumed deliberations, made

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2. Love/hate relationship with father/mother.

3. Daily extreme mental and physical abuse by father, also witness to daily physical abuse to mother and siblings.

4. Religious extremes confused defendant.

5. Confusing sexual more's [sic] at home (incest), with mother condoning or aware of incest/abuse.

6. Accused of death of favorite sister.

7. Stress of divorce from family.

8. Rejection of mother's love during teen years.

Thank you.

no further inquiries, and returned a penalty verdict of death.

McDowell unsuccessfully sought relief from the state supreme court, *see People v. McDowell*, 46 Cal. 3d 551, 763 P.2d 1269, 250 Cal. Rptr. 530 (1988), and this Court denied certiorari, *McDowell v. California*, 490 U.S. 1059 (1989). McDowell filed a federal habeas corpus petition, *see* 28 U.S.C. § 2254, which was denied by the district court. McDowell appealed. A three-judge panel of the United States Court of Appeals for the Ninth Circuit first affirmed the denial unanimously, 107 F.3d 1351 (9th Cir. 1997), and then, on rehearing, affirmed by a two-to-one vote, 116 F.3d 364 (9th Cir. 1997). Following a rehearing en banc, the Ninth Circuit, in a seven-to-four division, found that, in light of *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), the trial court's response to the jury inquiry, including referring the jury to legally correct instructions to consider all of the defense penalty evidence, did not dispel the jury's apparent confusion and violated the Eighth Amendment because the referenced instructions had previously been given. The Ninth Circuit vacated McDowell's sentence and instructed the district court to grant the writ and order a new penalty trial in state court. *McDowell v. Calderon*, 130 F.3d at 835, 837, 841, 842, slip. op. at 14010, 14014, 14024, 14025.

REASONS THE WRIT SHOULD BE GRANTED

INTRODUCTION

The jury inquired whether it could consider *eight* areas of defense evidence in penalty mitigation. The trial court answered the jury by directing it to the particular language in the previously given instructions which correctly, completely, and responsively addressed the jury's mitigation inquiry, including an instruction that the jury

should consider *all* the defense evidence. Indeed, the instruction in question has been given the effective imprimatur of this honorable Court. The trial court chose the safe and time-tested alternative of referring the jury to pre-existing, well-conceived guiding language rather than, as the Ninth Circuit majority would now require, the inherently hazardous course of replying only with a new, extemporaneous, and ad hoc instructional creation. In making this ruling, the Ninth Circuit en banc majority contradicted other circuits, the state supreme court, a number of its own prior precedents, and common federal and state trial court practice, and inventively found constitutional fault with the method the trial court chose to convey its clear and legally unassailable message.

The Ninth Circuit has set erroneous, unwise, and dangerous precedent, at least in death penalty cases, in a critical area of criminal trial litigation. It has, in effect, imposed (indeed, it has created) a new obligation on state and federal trial courts alike to respond to jury inquiries only with new language.

Granting certiorari herein is also in order because, in an opinion recently issued, *Buchanan v. Angelone*, No. 96-8400, 1998 WL 17109, at *5 (Jan. 21, 1998), this Court rendered a ruling that is controlling herein. A state has no Eighth Amendment obligation to instruct on particular mitigating factors. It follows that replying to a jury inquiry on particular mitigating evidence by referring it to previously given instructions which called for consideration of all proffered defense penalty evidence does not violate the Eighth Amendment.

The en banc majority decision herein is, additionally, one more entry in the Ninth Circuit's journal of circumvention, avoidance, an even nullification of the new rule prohibition of *Teague v. Lane*, 489 U.S. 288 (1989). The majority rationalizes that its invalidation of the jury reinstruction was compelled and dictated by this Court's holding in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

But *Eddings* was not a jury case. *Eddings* involved a trial judge's declination to consider relevant mitigating evidence in capital sentencing. It had nothing to do with the particular method by which a trial court conveys the law in response to a jury question. In light of numerous other recent decisions in which the Ninth Circuit has inappropriately chosen not to apply *Teague*, this Court should grant certiorari here in order effectively to assert its supervisory powers and ensure that its precedents are being followed, as the Constitution envisions, nationally.

ARGUMENT

I.

THE NINTH CIRCUIT HAS CREATED A CONFLICT WITH ESTABLISHED STATE AND FEDERAL PRECEDENT AND PRACTICE, AND HAS IMPOSED AN UNWARRANTED OBLIGATION ON STATE AND FEDERAL TRIAL COURTS, IN RULING THAT THE EIGHTH AMENDMENT RIGHT TO RELIABILITY IN CAPITAL SENTENCING PRECLUDES A TRIAL COURT FROM RESPONDING TO A JURY INQUIRY ON CONSIDERATION OF POTENTIALLY MITIGATING EVIDENCE BY REFERRING THE JURY TO RESPONSIVE AND LEGALLY FLAWLESS, BUT PREVIOUSLY GIVEN, INSTRUCTIONS

A. Conflict With Decisions of This Court

Certiorari should be granted herein because the Ninth Circuit's decision is incompatible with the intervening decision of this Court in *Buchanan v. Angelone*, No. 96-8400. The Ninth Circuit's decision was based on the concluded inadequacy of an instruction which covered an area as to which this Court later, in *Buchanan*, found there was no obligation to instruct at all.

Moreover, the Ninth Circuit has misapplied *Eddings v. Oklahoma*, 455 U.S. 104 (1982), a case involving a trial judge's refusal to consider mitigating penalty evidence, in order effectively to invalidate a jury instruction which conforms to this Court's directives.

1. *Buchanan v. Angelone*

a. Summary Reversal

The instant Petition has been affected by an intervening event: the January 21, 1998 opinion of this Court in *Buchanan v. Angelone*, No. 96-8400, 1998 WL 17109 (Jan. 21, 1998). The essence of the Ninth Circuit's ruling was that the trial court's instructions on mitigating evidence, although accurate, were inadequate. However, *Buchanan* followed with a statement that instructions on a capital sentencing jury's authority or obligation to consider mitigating evidence are not required by the Eighth Amendment. This subsequent opinion totally undercuts the Ninth Circuit's ruling.[2/] The Ninth Circuit's decision may therefore be reversed summarily.

b. Substantive Law

Buchanan held that

> [t]he absence of an instruction on the concept of mitigation and of instructions on particular statutorily defined mitigating factors did not violate the Eighth and Fourteenth Amendments to the United States Constitution,

1998 WL 17109, at *7, and reiterated that there is no obligation to channel or limit the jury's discretion at the

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2. Prior to oral argument before the en banc Ninth Circuit panel, the Court of Appeals notified counsel for both parties to be prepared to discuss *Buchanan*, in which certiorari had recently been granted. (The Order of the Ninth Circuit is reprinted in the Appendix.) However, the Court of Appeals did not inquire about *Buchanan* during oral argument and did not mention this then-pending case in its en banc opinion.

selection phase of sentencing, *id.* at *4-5. Keystoning the Ninth Circuit's en banc decision is the false and contrary premise that a state's obligation to direct and limit a sentencing jury's discretion extends beyond the eligibility stage, *McDowell v. Calderon*, 130 F.3d at 836, slip. op. at 14013-14, and that the trial court was constitutionally obligated to tell the jury (in language beyond that already given and referenced by the court) that the specific evidence to which its note referred came within statutorily defined mitigating factors, *id.* at 838, 841, slip op. at 14018, 14023.

The *Buchanan* trial court refused to give requested instructions that if the jury found certain factors relating to the petitioner's history, mental condition, and conduct to exist, this could be considered in penalty mitigation. *Buchanan*, 1998 WL 17109, at *3. This Court rejected Buchanan's derivative claim of constitutional error, stating that it had never ruled that the Eighth Amendment requires the jury to be instructed "on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State." *Id.* The Court went on to say that, while it had decided that a state may not preclude a sentencing jury from considering relevant mitigating evidence, it had never "held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." *Id.* at *4; *see also Tuilaepa v. California*, 512 U.S. 967, 969 (1994) (no Eighth Amendment violation for state to specify factors for jury to consider in determining penalty without designating individual factors as aggravating or mitigating).

Buchanan teaches that a state trial court is not required by the Eighth Amendment to instruct at all that certain defense evidence is mitigating. It follows that an instruction relating defense evidence to statutorily defined mitigating factors which is merely deemed inadequate also is outside the purview of the Eighth Amendment.

Here, when the jury inquired about whether eight areas of defense evidence could be considered mitigating, the trial court, by reference, replied that the jury could consider all defense evidence in its penalty determination.[3] Especially when viewed in light of *Buchanan*, there was clearly no "'reasonable likelihood,'" as a result either of the trial court's message or its method, "'that the jury . . . applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Buchanan*, 1998 WL 17109, at *5, *quoting Boyde v. California*, 494 U.S. 370, 380 (1990).

2. ***Eddings v. Oklahoma***

The proposition that "[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy," *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946) (Frankfurter, J.), is not at issue here.[4] The constitutional question in the instant case is whether

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3. *Any* other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and *any other aspect* of the defendant's character or personal history *that the defendant offers* as a basis for a sentence less than death.

(Emphasis added.)

4. *Bollenbach* did not invoke the United States Constitution, was neither a reinstruction case nor a federal review of state court action, and is distinguished by the fact the trial judge's response to the jury's request for supplemental instruction there was deemed inadequate because the judge "was simply wrong" in what he told the jury. 326 U.S. at 613.

the Eighth Amendment forbids a state trial court from performing this task -- i.e., clearing away the jury's difficulties -- through reinstruction rather than new instruction.[5]

Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), which the majority describes as "driving" the instant case, *McDowell v. Calderon*, 130 F.3d at 841, slip op. at 14024, held that a capital case sentencer must consider "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Here, the referenced instruction charged the jury to consider:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and *any other aspect of the defendant's character or personal history that the defendant offers as a basis for a sentence less than death*.

(Emphasis added.)

In short, the trial court here did exactly what this honorable Court said it should do, but the Ninth Circuit says this was not enough. And its says so (1) even though this honorable Court has ruled that language virtually

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5. Although the Ninth Circuit majority speaks in terms of jury confusion and an incorrect belief that the jury could not consider the eight aspects of McDowell's background, designated in the jury note, as mitigating evidence, 130 F.3d at 837, slip op. at 14014, it is questionable that the jury was confused at all. In context, and in light of the jury note's reference to one juror's belief that mitigating circumstances were the "equal" of the aggravating circumstances," *see supra* note 1, the jury's inquiry more likely was directed at weighing and balancing. *See* 130 F.3d at 842 n.1, slip op. at 14025 n.1 (dis. op. of Thompson, J.).

identical to the *unemphasized* portion of the instruction set forth above by itself "permits the defendant to present any evidence to show that a penalty less than death is appropriate to his case," *California v. Ramos*, 463 U.S. 992, 1005 n.19 (1983); (2) even though this Court has ruled that language essentially the same as the *unemphasized* portion of the above instruction does not improperly restrict a jury's consideration of penalty phase mitigating evidence, *Boyde v. California*, 494 U.S. 370, 381-82 (1990); (3) even though the actual presentation of substantial defense penalty phase evidence means that "the context of the proceedings would have led reasonable jurors to believe that evidence of [McDowell's] background and character could be considered in mitigation," *Boyde*, 494 U.S. at 383, and that it is "unlikely that reasonable jurors would believe the court's instructions transformed all of this 'favorable testimony into a virtual charade,'" *id.*, *quoting California v. Brown*, 479 U.S. 538, 542 (1987)); *accord Buchanan v. Angelone*, No. 96-8400, 1998 WL 17109, at *5 (Jan. 21, 1998); and (4) even though this Court presumes that juries follow instructions, *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985); *accord United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996). By restricting trial courts to composing new instructions, the Ninth Circuit majority's opinion undermines the efficacy of decisions of this Court.

B. Conflict With Other Circuits

Re-reading, or referring the jury to, an on-point, legally correct instruction is one long-recognized and practiced option that a trial court may exercise consistent with the Constitution, as the Ninth Circuit has itself in the past acknowledged. *United States v. Papia*, 560 F.2d 827, 843 (9th Cir. 1977) ("it is not error to respond to an inquiry by rereading relevant instructions that properly state the law applicable to the case"); *see also United*

States v. Hayes, 794 F.2d 1348, 1352 (9th Cir. 1986) ("[t]he necessity, extent and character of additional instructions are matters within the sound discretion of the trial court" (internal quotation marks omitted)), *cert. denied*, 479 U.S. 1086 (1987); *United States v. Collum*, 614 F.2d 624, 631 (9th Cir. 1979), *cert. denied*, 466 U.S. 923 (1980).

Other circuits agree with this eminently sound position. *E.g.*, *United States v. Cotton*, 646 F.2d 430, 434 (10th Cir.) (trial court's obligation to respond to jury inquiry may be satisfied by "the simple reading to the jury of an instruction previously given" as long as instruction at issue is accurate). *Accord United States v. White*, 794 F.2d 365, 370 (8th Cir. 1986); *Davis v. Greer*, 675 F.2d 141, 145 (7th Cir.), *cert. denied*, 459 U.S. 975 (1982); *United States v. Andrew*, 666 F.2d 915, 921-22 (5th Cir. 1982); *United States v. Braverman*, 522 F.2d 218, 224 (7th Cir. 1974), *cert. denied*, 466 U.S. 923, 985 (1975). The Ninth Circuit en banc majority has not cited, and Petitioner has not found, any other circuit court decision which has distinguished between capital and noncapital cases in the area of responding to jury inquiry.

The California Supreme Court also properly recognized that, while the trial court could have elected to break new ground and formulate original and off-the-cuff instructional language in response to the jury's inquiry, the trial court acted with constitutional propriety in choosing the alternative of directing the jury to existing language which was both responsive and legally flawless. *See People v. McDowell*, 46 Cal. 3d at 578-79, 763 P.2d at 1285, 250 Cal. Rptr. at 546.

This Court should thus grant certiorari in the instant case to resolve the conflict the Ninth Circuit has created with both federal and state courts.

C. Unprecedented and Improvident Obligation on Trial Courts

In addition, certiorari should be granted because the Ninth Circuit majority opinion is more than wrongly decided: it is expansive authority which in effect imposes an unprecedented and improvident obligation on both state and federal trial courts. Heretofore, criminal trial courts, in noncapital and capital cases alike, have had the discretion to respond to a jury inquiry either by replying in new language or by rereading or referring to already given instructions. But the en banc majority opinion here deprives trial courts of an effective and proper method of jury instruction. "[I]t forces state trial courts to deviate from accepted, correct instructions." *McDowell v. Calderon*, 130 F.3d at 843, slip op. at 14027 (dis. op. of Thompson, J.).

The inherently hazardous nature of the new-language-only straitjacket in which the Ninth Circuit has encased trial judges is demonstrated by the majority's own creation -- that the jury should have been told that it was free to consider any aspect of McDowell's background and character he offered as mitigating and that "'some, if not all, of the listed factors, could fall within the category.'" 130 F.3d at 841, slip. op. at 14023. As shown above, the first part of the majority's mandatory instructional solution was exactly what the referenced instruction stated. The second part, as Judge Thompson additionally and ably points out in dissent, is itself markedly deficient since it "would have caused the jury to wonder which 'some' of the factors on their list they could consider and whether they could or could not consider all of the factors." 130 F.3d at 843, slip. op. at 14027-28. Petitioner submits that when seven federal appellate judges, operating with months of time, significant support staff, and the inestimably valuable advantage of hindsight, can put forth only such a facially flawed product, it is totally unrealistic

to require a trial judge to engage in extemporaneous deviation from time-tested instructions.

But there is further misfortune here. Because the majority proffers an Eighth Amendment pedigree for its ruling, the new obligation it imposes extends both to state and federal courts. And, because the majority's core concept -- that if instructional language confuses the first time, additional exposure is no cure (130 F.3d at 838, slip. op. at 14018) -- is logically no more valid in the capital sentencing context than any other, the Ninth Circuit has created a judicial eclipse with a limitless penumbra.[6]

Unappreciated by the Ninth Circuit majority is that the very practice of providing juries with *written* versions of the instructions which have been given orally by the trial court is an acknowledgment that repetitive juror reference to instructional language can add to the jury's understanding and make the instructions more effective. Of course, there is no guarantee that jurors who submit questions to the court have actually read every word of

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6. The Ninth Circuit majority seeks to characterize this case as unique and therefore unlikely to affect other cases. The majority's purpose, though, appears not to narrow the scope of its holding, but to cast its ground breaking ruling as not "certworthy" and thus camouflage it from this Court's review. However, the majority's reference to the nonexistence of any "one-size-fits-all" jury response, *McDowell v. Calderon*, 130 F.3d at 840, slip op. at 14020, is a rubric that can be applied to assert any case is unlike all others. The concept that capital cases require more than usual assurances of reliability because "'death is qualitatively different,'" *id.*, slip op. at 14020-21, assumes, with neither logical nor precedential underpinning, that repetition of instructional language does not work in capital cases even though it may in noncapital cases.

the written instructions carefully. Moreover, lay jurors cannot be expected to have full recall of oral or written instructions given to them. Often, both in a courtroom setting and in common human experience as well, a second reading of written material may provide the reader with much more than did the first reading. Referral to pertinent instructions previously given, as opposed to creating original supplemental instructions, is thus a logical and sufficient option as long as the initial instructions accurately and understandably state the law.

II.

THE COURT OF APPEALS HAS VIOLATED THE "NEW RULE" PROSCRIPTION OF *TEAGUE V. LANE* IN THIS CASE AND HAS REGULARLY FAILED TO APPLY AND IMPLEMENT *TEAGUE*

A. Reasonable State Jurists in 1989 Would Not Have Felt Compelled by *Eddings v. Oklahoma* or Any Other Existing Precedent to Hold the Eighth Amendment Prohibited Replying to a Jury's Inquiry on Mitigation by Directing It to Responsive and Legally Correct Written Instructions That Had Already Been Given

In a nutshell, this is "the first case in Anglo-American jurisprudence to hold that a judge erred because he gave a jury instruction that is 100 percent correct." *McDowell v. Calderon*, 130 F.3d at 843, slip op. at 14028 (dis. op. of Kozinski, J.). By definition, the Ninth Circuit has violated the proscription of *Teague v. Lane*, 489 U.S. 288 (1989), against announcing or applying a new constitutional rule to grant habeas corpus relief.

Under this Court's jurisprudence, and thus as part of "the law of the land," it is fundamental that federal habeas corpus review involving persons in state custody is an extraordinary and limited remedy. *Teague*, 489 U.S. at 316; Richard H. Falon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1747 (1991). Federal "habeas relief is appropriate only if 'a state court considering [the petitioner's] claim at the time his conviction became final would have felt *compelled by existing precedent* to conclude that the rule [he] seeks was required by the Constitution.'" *Gray v. Netherland*, 116 S. Ct. 2074, 2083 (1996), *quoting Saffle v. Parks*, 494 U.S. 484, 488 (1990).[7]

McDowell's conviction became final in 1989 when certiorari was denied in his direct appeal. *See McDowell v. California*, 490 U.S. 1059 (1989). At that time, it was well established that one option a trial judge had in addressing a question from the jury was to reread, or refer the jury to, instructions that were previously given provided that the referenced instructions were responsive to the jury's inquiry and correctly stated the relevant law. *See, e.g., United States v. White*, 794 F.2d 365, 370 (8th Cir. 1986); *United States v. Andrew*, 666 F.2d 915, 921-22 (5th Cir. 1982); *United States v. Cotton*, 646 F.2d 430, 434 (10th Cir.), *cert. denied*, 454 U.S. 861, 102 S. Ct. 316, 70 L. Ed. 2d 159 (1981); *United States v. Collum*, 614 F.2d 624, 631 (9th Cir. 1979), *cert. denied*, 466 U.S. 923 (1980) *United*

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7. There are two exceptions to the *Teague* prohibition: (1) the new rule renders a class of private conduct beyond a state's proscriptive power; (2) the new rule is a watershed rule of criminal procedure which implicates the accuracy or fundamental fairness of the criminal proceeding. *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990). The Ninth Circuit majority does not assert that either exception is applicable in this case.

States v. Papia, 560 F.2d 827, 843 (9th Cir. 1977) *United States v. Braverman*, 522 F.2d 218, 224 (7th Cir. 1974), *cert. denied*, 466 U.S. 923, 985 (1975).

There was no precedent in 1989 that created a constitutional exception for capital cases or for sentencing issues. The Ninth Circuit majority cites none. This is not surprising since the instant case is the first one to do so.

Instead, the Ninth Circuit majority has endeavored to avoid *Teague* by the tactically necessary, but legally insupportable, assertion that its effective invalidation of the death penalty here is somehow dictated by *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). *McDowell v. Calderon*, 130 F.3d at 841, slip op. at 14024.

On its face, the Ninth Circuit's rationale not only fails, but also constitutes precedent for rendering *Teague* meaningless. *Eddings* was a capital case, but it was not a jury case. There, the sentencer was the trial judge, who ruled that he could not consider the defendant's troubled youth as a mitigating factor in his determination of penalty. 455 U.S. at 109. True, the instant case can be compared to *Eddings* in that in each there was an expression related to the sentencer's point of view on consideration of evidence. However, unlike the instant case, the sentencer in *Eddings* was not subsequently exposed to a proper statement of the law.

In other words, the Ninth Circuit's eosinophilic analysis suffers from the "apples and oranges" syndrome. *Eddings* is directed to the scope of evidence; the instant case concerns the method by which the law is communicated to a jury. *See Gilmore v. Taylor*, 508 U.S. 333, 343 (for *Teague* purposes, exclusion of evidence is different from jury instructions which restrict a defendant's ability to present an affirmative defense); *cf. Sawyer v. Smith*, 497 U.S. 227, 232, 234-37 (1990) (holding of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that prosecution argument which diminishes jury's sense of capital sentencing responsibility violates Eighth

Amendment, not dictated by *Eddings* or *Lockett v. Ohio*, 438 U.S. 586 (1978), even though Court relied on these cases in *Caldwell*).

It is, initially, questionable whether a holding that it is improper for a sentencing judge not to consider mitigating evidence can logically lead to a holding that

redirecting a jury to language to consider *all* defense evidence is tantamount to telling it *not* to consider defense evidence. It is, ultimately, indefensible to conclude, as does the Ninth Circuit, the the first holding *compels* the second.[8] At a minimum, "the new-rule doctrine 'would be meaningless if applied at this level of generality.'" *Sawyer v. Smith*, 497 U.S. 227, 236 (1990).

The Ninth Circuit majority's opinion herein should not be allowed to stand because it constitutes precedent that undermines other important *Teague* principles: (1) "A rule is not 'dictated by precedent' unless it falls within a narrow description of the facts and outcomes of prior decisions." (2) "The existence of a conflict of authority is prima facie evidence that a rule is not dictated by precedent." (3) "A rule is not dictated by precedent if reasonable state court judges could disagree as to the proper rule." Linda Meyer, "*Nothing We Say Matters*": Teague *and New Rules*, 61 U. Chi. L. Rev. 423, 455-56 (1994) (footnotes omitted).

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8. Even if it could be established that the Ninth Circuit's rule herein was a "logical extension," *Gilmore v. Taylor*, 508 U.S. 333, 350 (1993), or even "the most reasonable" interpretation, of *Eddings* and any progenitors it may have, *Lambrix v. Singletary*, 117 S. Ct. 1517, 1530 (1997), this would not be enough for removal from the *Teague* prohibition, since *Eddings* did not compel the rule.

The circuit court opinions cited above (*see supra* at 18) which support jury reinstruction, constitute convincing evidence both that the Ninth Circuit's rule here is not dictated by precedent and that the California Supreme Court was reasonable in 1989 when it upheld the trial judge's method of responding to the jury here. The State, additionally, submits that the fact a United States district judge and the original Ninth Circuit panel also upheld the trial court is added corroboration for this position.[9] Certainly, in this light, there can be no viable claim that the state supreme court did not render a reasonable and good faith interpretation of existing precedent when it upheld McDowell's conviction. *See Gilmore v. Taylor*, 508 U.S. at 340; Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. Rev. 503, 512 (this Court "has, in effect, created a good faith exception for state adjudication of federal constitutional claims").

The *Teague* issue herein is also affected by this Court's recent decision in *Buchanan v. Angelone*, No. 96-8400, 1998 WL 17109 (Jan. 21, 1998). In *Buchanan*, the Court decided the Eighth Amendment does not require that a sentencing jury in a capital case be instructed either on the general concept of mitigating evidence or on particular mitigating factors established by statute. *Buchanan*, 1998 WL 17109, at *2, *7.

Thus, the warden submits that *Buchanan* means that, neither henceforth nor in the past, is there or has there been a constitutional requirement that a state must instruct a jury on mitigation generally or on specific mitigating factors, and that, as a corollary, there is no

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9. Indeed, the author of the majority en banc decision at first joined in a unanimous panel opinion. *McDowell v. Calderon*, 107 F.2d 1351 (9th Cir. 1997). Surely, no one would deny that he was a reasonable jurist before he changed his mind on the reinstruction issue.

requirement to instruct, even on request, that particular evidence is mitigating. Even should this Court's opinion later be interpreted as not having gone so far, one thing is certain: the Court did not hold to the contrary. Accordingly, it is clear that, when Petitioner's direct appeal became final in 1989, all reasonable jurists would not have felt compelled to conclude that a state must instruct a capital jury, on request, that particular evidence is mitigating. *See Tuilaepa*, 512 U.S. at 981 ("it follows" from the holding in *Zant v. Stevens*, 462 U.S. 862 (1983), that an incorrect characterization of sentencing factor as aggravating was non prejudicial and "that the failure to characterize factors such as the age of the defendant or the circumstances of the crime as either aggravating or mitigating is also unobjectionable") (conc. op. of Stevens, J.).

Accordingly, even if the Ninth Circuit's decision herein is somehow not invalidated by *Buchanan*, it is surely barred by *Teague* and therefore should be reversed. At a minimum, the matter should be remanded to the Court of Appeals with instructions to decide the case anew, consistently with *Buchanan* and *Teague*.

B. The Ninth Circuit Has Regularly Failed to Apply and Implement *Teague*

This Court has consistently followed the precedent it set for all federal courts in *Teague* and has consistently enforced and implemented its standards in a variety of different contexts, reminding federal courts not to apply new rules on collateral review. *O'Dell v. Netherland*, 117 S. Ct. 1969 (1997); *Lambrix v. Singletary*, 117 S. Ct. 1517, 1525-28 (1997);*Gray v. Netherland*, 116 S. Ct. 2074, 2083 (1996); *Goeke v. Branch*, 115 S. Ct. 1275, 1276 (1995); *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *Gilmore v. Taylor*, 508 U.S. 333, 339-40 (1993); *Graham v. Collins*,

506 U.S. 461, 466-67 (1993); *Stringer v. Black*, 503 U.S. 222, 227 (1992); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Butler v. McKellar*, 494 U.S. 407, 412-14 (1990); *Saffle v. Parks*, 494 U.S. 484, 487-88 (1990). In only one case in which this Court has confronted a *Teague* challenge did the Court find the rule to have been dictated by precedent, and therefore not "new." *See Penry v. Lynaugh*, 492 U.S. 302, 329 (1989). To date, this Court has never found an exception to *Teague*.

In contrast, the Ninth Circuit has regularly declined to apply *Teague*'s bar to new rules or has repeatedly declared that a new rule meets *Teague*'s exceptions. *See, e.g., Robbins v. Smith*, 125 F.3d 831, 835 (9th Cir. 1997) (rule invalidating California method for addressing no-merit appellate briefs "predetermined" by *Anders v. California*, 388 U.S. 924 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988)); *Gallego v. McDaniel*, 124 F.3d 1065 (9th Cir. 1997) (finding that a Supreme Court opinion *upholding* a commutation instruction dictates *reversing* a death penalty conviction); *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir. 1997) (rule of timeliness of self-representation motions is not "new" ipso facto because it was announced by *Ninth Circuit* prior to petitioner's case becoming final); *Rupe v. Wood*, 93 F.3d 1434, 1440-41 (9th Cir. 1996) (finding *Teague* not implicated by a rule requiring admission of polygraph evidence); *Snook v. Wood*, 89 F.3d 605, 611-13 (rejecting asserted *Teague* bar to requirement that state trial court conduct colloquy with criminal defendant prior to allowing self-representation); *Harmon v. Marshall*, 69 F.3d 957, 966-67 (9th Cir. 1995) (finding reasonable doubt instruction deficient in light of non-habeas Ninth Circuit precedent, and further finding that such error meets *Teague* exception for "fundamental fairness"); *Paradis v. Arave*, 20 F.3d 950 (9th Cir. 1994) (rejecting *Teague* defense on variety of issues without demonstrating identity of claim and prior precedent); *Fetterly v. Paskett*, 15 F.3d 1472, 1477-78 (9th Cir. 1994)

("notwithstanding the [Supreme] Court's crystal clear pronouncements, the panel rushes headlong to apply a new, incredibly broad rule [regarding construction of a criminal sentencing statute] retroactively to petitioner without even explaining why it may do so") (dis. op. of Kozinski, J.); *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995) (finding *Teague* not implicated if underlying issue involves post-conviction proceedings); *Jimenez v. Myers*, 12 F.3d 1474, 1482 (9th Cir. 1993) (disapproving state method for dealing with deadlocked jury despite dissent's claim that "[i]f *Teague* does not bar retroactive application in these circumstances, it has no meaning at all") (dis. op. of Kozinski, J.); *Jimenez v. Myers*, 40 F.3d 976, 981 (9th Cir. 1993) (amended opinion construing trial judge's questions and comments as violating *Allen v. United States*, 164 U.S. 492 (1896), is "far more novel and far more dangerous than what the majority said the last time around") (dis. op. of Kozinski, J., citing *Teague*); *Beam v. Paskett*, 3 F.3d 1303, 1310-11 (9th Cir. 1993) (invoking *Hernon v. Lowry*, 301 U.S. 242 (1937), as justification for refusing to find that *Teague* bars conclusion that trial court's application of "continuing threat" aggravating sentencing factor violates Eighth Amendment, and alternatively finding the holding satisfies both *Teague* exceptions); *Blazak v. Ricketts*, 1 F.3d 891, 898 n.8 (9th Cir. 1993) (rejecting *Teague* defense to rule allowing consideration of evidence never presented in state court on question of mental competence); *Jeffers v. Lewis*, 974 F.2d 1075, 1079-81 (9th Cir. 1992) (finding that Ninth Circuit's new rule regarding trial court's review of mitigation evidence in capital case was "dictated by prior [Ninth Circuit] precedent . . . [and] merely applied the teachings of *Lockett* [*Lockett v. Ohio*, 438 U.S. 586 (1978)] and *Eddings* [*Eddings v. Oklahoma*, 455 U.S. 104 (1982]" and therefore was not subject to *Teague*); *Beam v. Paskett*, 966 F.2d 1563, 1570 n.5 (9th Cir. 1992) (allowing new rule regarding instructional error in capital case as long as "we

have twice [retroactively] applied the rule" on habeas corpus); *Coe v. Thurman*, 922 F.2d 528, 533-34 (9th Cir. 1990) (announcing new rule ordering state appellate court to decide state appeal within a specified time period, and finding "that the new rule *Coe* established is not the kind of rule of which *Teague* applies"); *Robinson v. Borg*, 918 F.2d 1387, 1389-1404 (9th Cir. 1990) (applying new rule regarding equivocal invocation of right to counsel even over dissent's extended discussion of *Teague* bar); *Ostrosky v. State of Alaska*, 913 F.2d 590, 594-95 (9th Cir. 1990) (new rule regarding mistake-of-law defense falls within second exception to new-rule prohibition); *Harris v. Vasquez*, 901 F.2d 724, 726-27 (9th Cir. 1990) (new rule regarding competency of psychiatric assistance "at least arguably" satisfies *Teague*'s fundamental fairness exception).[10]

Consequently, the instant case is not merely an isolated example of the Ninth Circuit's efforts to eschew *Teague*. This case therefore takes its place alongside many others in which the Ninth Circuit has avoided, circumvented, and, in a sense, judicially nullified *Teague* within its territory and announced or applied new rules despite *Teague*'s bar. The total number of such cases is impossible to determine in light of the existence of those

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10. The list of published cases in which the Ninth Circuit has upheld a *Teague* defense is considerably shorter. *See Gretzler v. Stewart*, 112 F.3d 992 (9th Cir. 1997); *Jones v. Gomez*, 64 F.3d 1373 (9th Cir. 1995); *Clabourne v. Lewis*, 64 F.3d 1375 (9th Cir. 1995); *Turner v. Marshall*, 63 F.3d 807 (1995) (*Turner I*); *Woolery v. Arave*, 8 F.3d 1325 (9th Cir. 1995); *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991); *Jackson v. Ylst*, 921 F.2d 882 (9th Cir. 1990); *Barker v. Estelle*, 913 F.2d 433 (9th Cir. 1990); *Harris v. Vasquez*, 913 F.2d 606, 622 (9th Cir. 1990); *Allen v. Bunnell*, 901 F.2d 820 (9th Cir. 1990).

like *Marshall v. Turner*, 121 F.3d 1248 (9th Cir. 1997), *petition for cert. filed* (No. 97-1071), in which the Ninth Circuit failed even to respond to the *Teague* defense.

Accordingly, the Ninth Circuit's new ban on the traditional alternative of jury reinstruction deserves the review of the Supreme Court of this nation, for the importance of the substantive issue, the resolution of conflicts with state and federal precedent and practice which it has created, and the maintenance of a truly national court system.

CONCLUSION

For the reasons set forth above, Petitioner requests that the instant Petition for Writ of Certiorari be granted and that this Court hear the matter fully. There is, however, also another viable alternative. In light of the Ninth Circuit's clear violation of *Teague's* new rule prohibition, and in light of the issuance of the opinion in *Buchanan v. Angelone* after the Ninth Circuit en banc decision herein, summary reversal, based on either *Teague*, *Buchanan*, or both, would be appropriate herein.

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Respectfully submitted,

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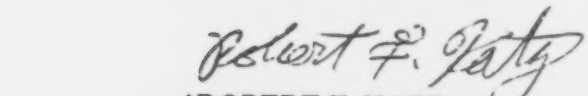

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